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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-170

EDDIE THOMPSON, JR., ET AL.,
PETITIONERS,

vs.

CITY OF COVINGTON, ET AL.,
RESPONDENTS.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

EDDIE THOMPSON, JR., Pro Se

736 Highland Avenue
Covington, Kentucky 41011
1-606-491-6278

I hereby certify that 3 copies of the foregoing petition have been served by the United States mail, upon:

Mr. Donald C. Wintersheimer, 306 Covington-Kenton County Municipal Building, Third and Court Streets, Covington, Kentucky

Mr. Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530

this ..... day of October, 1975.

.....
Eddie Thompson, Jr., Pro Se

COURT INDEX PRESS, INC. — 620 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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Miscellaneous:

A corporation, especially a membership corporation, may be deemed a "citizen" for various purposes. *Oneida County Forest Preserve Council* v. *Wehle,* 128 NE 2d 282.

Petitioner, Covington Housing Development Corporation is a corporation, and therefore, it is said, it cannot claim

for itself the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true . . . . But it has business and property for which it claims protection. The Corporation is threatened with destruction through the unwarranted compulsion which respondents have exercised . . . and this Court has gone very far to protect against loss threatened by such action . . . Petitioners ask protection against arbitrary, unreasonable, and unlawful interference . . . . *Pierce* v. *Society of Sisters of Holy Names,* 268 US 1070; *Terrace* v. *Thompson,* 263 US 197.

Federal Rules of Civil Procedure, Rule 56

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Petitioners present their petition for a rehearing of this Court's order dated October 6, 1975, denying the petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and, in support thereof, respectfully show:

GROUNDS FOR REHEARING

The Court of Appeals did not review the record to see that all matter presented in the pleadings was tried and decided with due process (Pet. for Rehearing en banc, Court of Appeals).

None of the prejudice errors made by the Court below were corrected in the Court of Appeals. An appeal to the Court of Appeals is a right. Plaintiffs appealed the order dismissing the City of Covington (Brief, pgs. 1, 13, 14).

The reason Plaintiffs appealed is that they had no opportunity to be heard on the Motion to Dismiss.

There are many unanswered questions: Was the Housing Development project terminated? Was it terminated illegally? Was the staff paid? Was the project terminated because a black director was hired? Did plaintiffs receive due process of law?

In *Kennedy* v. *Silas Mason Co.*, 334 US 249, this Court stated Summary Judgment procedures "present a treacherous record for deciding issues of far flung import." (Pet. for Rehearing En Banc, Court of Appeals)

Mr. Wagner admitted to the Court of Appeals in his sworn affidavit that Thompson was counsel in the district court. The record indicates that Mr. Clifford Fennell was the attorney in this case. However, Mr. Condit and Mr. Wagner had prevented Mr. Fennell from performing his duty. The reason for Mr. Wagner's statement of who was counsel in the district court was to prevent the Court from letting Thompson argue for the Corporation.

This action was commenced in the District Court by the Covington Housing Development Corporation and Eddie Thompson, Jr., jointly and severally, against the City of Covington, Grimm, Bowman, Wermeling, Sageser, Simpson, Royster, Condit, Hedrick, Wolfe, Woods, and HUD Representatives Carlton and Wooten, to redress wrongs suffered by the Corporation and Thompson as a result of the illegal withholding of funds and the subsequent illegal phasing out of said project. (Original Complaint)

Thompson was injured by this illegal action. The illegal withholding of income he had already earned and the denying of employment because the City Manager was opposed to a black as executive director of the Corporation were indeed injuries. (Original Complaint)

> "Under due process of the Fourteenth Amendment the question is not merely the weight of the individual's interest, but whether the nature of the interest is one within the contemplation of the liberty or property" of the Fourteenth Amendment. *Morrissey* v. *Brewer,* 408 US 471.

One injured by the wrongful act of another to which he in no respect contributed is entitled to compensation from the wrongdoer. *Little* v. *Hackett,* 116 US 366.

On the Motion to Dismiss, the District Court dismissed action as to the City of Covington citing *Monroe* v. *Pape,* 365 US 167:

> "that a municipality is not a 'person' within the purview of the Civil Rights Act . . . . the Court held that 42 USC 1983 . . . . was intended to provide private parties a cause of action for abuse of official authority which resulted in the deprivation of Constitutional rights, privileges, and immunities."

Had Thompson not stated a cause at that time, he should have been dismissed. According to the record, he was not dismissed at that time; and we must assume that Thompson was a proper party to this litigation.

> If matters outside of the pleadings were presented and not excluded by the Federal District Court at hearing on a motion to dismiss the complaint, in part for its failure to state a claim on which relief can be granted, the Court is required by Rule 12 (b) of the Federal Rules of Civil Procedure to treat the motion as one for Summary Judgment and to dispose of it as provided for in Rule 56 of Federal Rules of Civil Procedure. *Carter* v. *Stanton,* 405 US 669.

Neither Thompson nor the Corporation had notice of or hearing on the Motion to Dismiss the City of Covington.

Attorney did not answer the motion (Pet. 10), nor was he present at any hearing on said motion. The record does not indicate that there was a hearing. Plaintiffs were denied due process.

> Due process implies notice and a hearing. *Orchard* v. *Alexander,* 157 US 372.

The complaint states that defendants had funds illegally withheld from Housing Development Corporation because the City Manager was opposed to a black (Thompson) having the position of executive director; that Mr. Royster, Mr. Woods, and Mrs. Hedrick conspired with Mr. Carlton to withhold these funds illegally; that the City Manager ordered the Housing Development Corporation Board of Directors to discharge the staff, but refused to release funds to pay the staff; that the C.D.A. failed to negotiate with the Corporation according to HUD Guidelines due to racial discrimination.

The right to participate in this Model Cities project is clearly set out in *North City Area-Wide Council* v. *Romney,* 469 F2d 1326 (1972). The federal assistance in the program must be in prompt response to local initiative.

The United States Attorney moved to dismiss Carlton and Wooten. Again, plaintiffs had no notice or hearing; nor was their attorney present.

The United States Attorney filed the affidavit of Mr. Virgil Kinnaird, Area Office Director, and in that affidavit Mr. Kinnaird admitted that Roger Carlton had taken the action alleged. (Defendants' Brief, Court of Appeals)

The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard rights for which the constitutional protection is invoked. *Anderson National Bank* v. *Luckett,* 321 US 233.

Lack of due process in this instance prejudiced the rights of Thompson as he was an injured party, yet he was arbitrarily singled out as stating only one of the eleven counts in the complaint.

> 42 USC 1983 was designed to redress deprivation of rights, without procedural due process or equal protection by persons acting under color of law. *Monroe* v. *Pape,* 365 US 167, 173-176.

On July 16, 1974, there was to be a hearing on all motions before the Court. There was a motion for Summary Judgment by plaintiffs, Covington Housing Development Corporation and Eddie Thompson, Jr., before the Court. Thompson's rights had been prejudiced earlier in the order dismissing Carlton and Wooten without a hearing or notice. (Original record entry 54). Defendants acknowledged that without question there were many issues of material fact (Original record entry 63) and that Grimm, Wermeling, Bowman, Sageser, and Simpson had not *intentionally* discriminated against Thompson.

> No specific intent to deprive a person of a federal right is necessary to create liability under 42 USC 1983. *Monroe* v. *Pape, supra.*

Local defendants' motion for Summary Judgment (Defendants' Appendix, pg. 70-74) or an order dismissing plaintiff, Covington Housing Development Corporation was before the Court. It was asked that this motion be granted with prejudice or without prejudice. The Judge further prejudiced Thompson's rights by dismissing complaint at cost of plaintiff Thompson.

Thompson picked up plaintiffs' attorney, Mr. Fennell, to insure his presence in Court. Mr. Condit and Mr. Wagner were surprised that Mr. Fennell showed up. They

badgered him in the halls. When court began, they insisted that the complaint be amended to show Thompson's authority to bring this suit in the name of the Corporation.

There were no hearings on the motions before the court that day or any other day.

Plaintiffs filed Memorandum to show authority to bring this suit in the name of corporate party.

The Court granted defendants Summary Judgment. But,

> Determining whether Thompson had authority to sue for Corporate Body, was not a matter that could be determined by Summary Judgment. The facts of the case had to be reviewed. *Elk Valley Coal Co.* v. *Thompson,* 150 S.W. 817.

The District Court's reference to depositions and interrogatives (Pet. 21) of other participants in the operation had no bearing on the motions without due process.

There are no interrogatives of any board members in the record. However, there is an affidavit of a board member in the record (Original Record entry 58) which states that five members of the board gave their consent to file this suit. There is no affidavit of any board member stating that Thompson was not authorized to file this action.

Depositions were taken of Thompson and Blythe. The Court did not determine if Mr. Blythe was a managing agent (Plaintiffs Brief, Court of Appeals, pg. 18-19).

> The question of whether deposition taken of a managing agent of a Corporation is one which binds or can be used against the Corporation does not arise until it is offered in evidence at the trial. *Kolb* v. *A. H. Bull Steamship,* 31 FRD 252.

> A Summary Judgment against a plaintiff will be vacated and the cause remanded, when Federal District Court's order is opaque and unilluminating as to either the relevant facts or law with respect to the

merit of plaintiff's claim. *Carter* v. *Stanton*, 405 US 669.

The District Court inference on a barren record and pursuant to motions to dismiss were improper. *Smith* v. *Apple*, 264 US 274.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for a Rehearing be granted, and that, upon further consideration, Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

. . . . . .

EDDIE THOMPSON, JR., Pro Se

CERTIFICATE OF COUNSEL

I, Eddie Thompson, Jr., do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

. . . . . .

EDDIE THOMPSON, JR., Pro Se